

D. BRAUMAN - CROSS/MR. TROWEL

40

1 in her father; is that right?

2 A Correct.

3 Q Were you able to verify that in any way?

4 A Verify her?

5 Q Her experience?

6 A No.

7 Q So did you incorporate that into your report? Did you
8 sort of take her at her word when she told you that?

9 A Well, you take all of the pieces of data and you fit
10 them together, so you don't make a conclusion based on just
11 one piece of data, it was consistent with other pieces of
12 data I already heard from --

13 Q I'm sorry to interrupt.

14 A I already heard that same or similar information from
15 defense counsel and had been provided with a medical record
16 indicating a diagnosis of dementia prior to his arrest.

17 Q Were you able to -- when defense counsel told you about
18 issues she was having, were you able to confirm that those
19 had occurred?

20 A I never witnessed their interactions myself.

21 Q So were you using two unverifiable pieces of evidence
22 to verify each other -- to verify the other? In other words
23 -- I'm sorry to interrupt.

24 A I would say that I look at all the data together, not
25 one independent of the others. So it's not just two

D. BRAUMAN - CROSS/MR. TROWEL

41

1 independent of everything else.

2 Q So just step back for a moment. When we talk about --
3 when you discussed the defendant's memory, is it fair to say
4 that you relied on the number of sources in concluding that
5 he may have some issues retaining information?

6 A Yes.

7 Q And was one of those sources the report from his
8 family?

9 A Yes.

10 Q And was one the report from his lawyer?

11 A Yes.

12 Q And then was another some of the testing that he did?

13 A Right.

14 Q And were there others?

15 A Yes. There was a medical record that indicated that he
16 had been receiving treatment for dementia and was prescribed
17 Aricept.

18 Q Did that tell you anything about -- did the medical
19 records tell you anything about how the dementia was
20 affecting him?

21 A I don't believe there were many details.

22 Q And so my question is: To the extent that the
23 collateral reports you were getting could not be verified,
24 were you using them in the course of your conclusion to
25 support the conclusion, even though you couldn't verify

D. BRAUMAN - CROSS/MR. TROWEL

42

1 them?

2 A Yes.

3 Q You also mention that the daughter told you
4 specifically that he, on occasion, confabulated, I think was
5 the word you used, confabulated events, correct?

6 A Correct.

7 Q Did you, yourself, see that in the course of your
8 evaluation?

9 A I don't recall specifically.

10 Q Would you have noted it if you -- in your report, if
11 you had seen it?

12 A Most likely, yes.

13 Q On direct, defense counsel asked you a series of
14 questions about etiology. Do you remember those?

15 A Yes.

16 MR. TROWEL: Etiology.

17 Q Etiology. And in the course of your testimony, I
18 believe you discussed with the defense counsel possible
19 physiological factors that could result in symptoms of
20 dementia; is that correct, or that could result in a
21 diagnosis of dementia?

22 A I believe she presented some possible etiologies, yes.

23 Q And was it your testimony that those possible these
24 etiologies, hypothetically speaking, could result in
25 dementia?

D. BRAUMAN - CROSS/MR. TROWEL

43

1 A Can you repeat that one more time?

2 Q Sure. Was it your -- do you recall, was it your
3 testimony that those physiological etiologies --

4 MS. DOLAN: I'm going to object to this
5 characterization of my direct, it's not even in the
6 ballpark.

7 THE COURT: I'm going to overrule it and the
8 witness is certainly capable of correcting
9 mischaracterization of counsel. So why don't you put the
10 question again, counsel.

11 MR. TROWEL: I'll try to rephrase, your Honor, to
12 make it clear as well.

13 THE COURT: Okay.

14 Q Defense counsel asked you about fatigue; is that right,
15 whether that could have -- whether that could cause
16 dementia?

17 MS. DOLAN: I don't ask about -- objection.

18 THE COURT: Well, maybe she'll say you didn't ask
19 about it, so let's let her answer the question.

20 A I recall offering fatigue could be one factor in terms
21 of someone's performance on testing.

22 Q Were there other factors that you discussed with
23 defense counsel that could also effect an individual's
24 testing, physiological effects?

25 A Yes. Generally speaking, substance use or if someone

D. BRAUMAN - CROSS/MR. TROWEL

44

1 is under the influence of medication or if they have other
2 medical conditions.

3 Q Even assuming though that a defendant had a
4 physiological problem that resulted in lower test scores,
5 isn't it nevertheless true that the test scores would
6 underestimate their actual abilities?

7 A Can you rephrase that question?

8 Q Sure. If it is -- hypothetically speaking, if you have
9 a hypothetical defendant who is suffering from a
10 physiological problem that results in lower test scores, is
11 it not nevertheless true -- isn't it nevertheless true that
12 the test scores will underestimate the defendant's actual
13 abilities?

14 THE COURT: Could you read that question back,
15 please.

16 (Question was read back.)

17 THE COURT: Do you understand the question?

18 THE WITNESS: I'm sorry, it's --

19 THE COURT: Why don't you put in another question,
20 it seems a little bit confusing.

21 MR. TROWEL: Could I give it one more shot?

22 THE COURT: You can give it five more shots.

23 MS. DOLAN: Well, objection to that.

24 THE COURT: But perhaps straighter shots, narrower
25 shots, clearer shots might be appropriate.

D. BRAUMAN - CROSS/MR. TROWEL

45

1 MR. TROWEL: Thank you, your Honor.

2 Q The question I'm asking, Dr. Brauman, is: Does it
3 matter, does the etiology matter when you're talking about
4 lower test scores? Isn't the result still --

5 THE COURT: Wait. Wait. One question at a time.
6 Does the etiology matter when you're talking about test
7 scores?

8 THE WITNESS: It matters in terms of the ultimate
9 diagnosis, but the test score is the test score.

10 Q And no matter the etiology, a test score that's
11 effected, even by a physiological problem, still
12 underestimates the defendant's actual ability, isn't that
13 right?

14 A Say that one more time, please?

15 THE COURT: Read it back, listen to the question.
16 (Question was read back.)

17 THE WITNESS: I'm still confused by your question.

18 THE COURT: Put another question, counsel.

19 MR. TROWEL: I really am sorry. I do think this
20 is an important point.

21 THE COURT: That's why I keep letting you go at
22 it. Break it down. Go ahead.

23 BY MR. TROWEL:

24 Q Let's suppose hypothetically that the defendant was
25 suffering from fatigue. And because he was suffering from

D. BRAUMAN - CROSS/MR. TROWEL

46

1 fatigue, he did poorly on a test.

2 A Okay.

3 Q Okay. Even though that's a physiological etiology,
4 isn't it still true that the lower test scores underestimate
5 his actual ability?

6 A In some cases it could be an underestimate. If it's a
7 function of something that might change over time, like
8 fatigue, one might be fatigued when you meet with them on
9 Monday, but Tuesday they may not be fatigued, or something
10 that's more -- that's not dynamic, something that's more
11 static as in the case of dementia, it might be something
12 that you expect to see over time, so it wouldn't necessarily
13 be an underestimate.

14 THE COURT: Let me ask the witness this question,
15 it goes back to an old WC Fields joke: A woman comes up to
16 WC Fields and says, you are drunk. And he says, yes, I am,
17 ma'am, but you're ugly, and tomorrow I'll be sober, okay?
18 That's the joke. Not PC, but that's the joke.

19 Now, he's trying to get a sense of whether or not
20 you go from a fatigue platform on the test and that's locked
21 in or whether the next day he might or might not be sober,
22 okay?

23 So could you try to put a simple-minded, for the
24 poor District Court Judge here, put on your WC Fields hat,
25 answers his questions and then we'll have a re-direct, okay?

D. BRAUMAN - CROSS/MR. TROWEL

47

1 That's the issue, okay? Are we clear now on what we're
2 trying to get at?

3 MR. TROWEL: I think so, your Honor.

4 THE COURT: Okay.

5 BY MR. TROWEL:

6 Q So in this case, Dr. Brauman, the defendant scored
7 poorly on certain tests, right?

8 A Yes.

9 Q And there are a number of reasons -- there are a number
10 of potential reasons for that, correct?

11 A Yes.

12 Q And I believe on Ms. Dolan's direct she suggested that
13 maybe there could be a physiological reason for that.
14 That's a possibility, right?

15 A I believe I suggested that's one possibility.

16 Q And even if it was a physiological reason, the lower
17 results would nevertheless be an underestimate of his actual
18 abilities?

19 A Still no, not if it's something that's a static
20 condition. It's not an underestimate if that is his true
21 functioning.

22 Q Let's say he had low blood sugar and he did poorly on
23 the test.

24 A Well, blood sugar is not static, that's dynamic.

25 Q So if his blood sugar condition improved, would you

D. BRAUMAN - CROSS/MR. TROWEL

48

1 expect him to do better on a subsequent test?

2 A Sure.

3 Q Thank you.

4 MR. TROWEL: I apologize that that took as long as
5 it did.

6 THE COURT: It's okay. I've got lots of old
7 fashioned jokes to get us to the resolution, if we have to
8 go down that road. Come on.

9 Q On direct you discussed with Ms. Dolan a
10 neuropsychological exam that was done before you evaluated
11 the defendant; is that correct?

12 A Correct.

13 Q And you testified that -- or I'll -- withdrawn.

14 Did you request that neuropsychological exam from
15 Ms. Dolan?

16 A I did.

17 Q And why did you request it?

18 A Because considering those findings would be very
19 important for my own conclusions and also reviewing that
20 testing data might be helpful.

21 Q Did Ms. Dolan permit you to review the report?

22 A No.

23 Q Did you specifically ask her for a copy of it by E-mail
24 and by phone?

25 A Yes.

D. BRAUMAN - CROSS/MR. TROWEL

49

1 Q And did she give you a copy of it?

2 A No.

3 Q Now, when you began testing the defendant, did you
4 communicate with defense counsel?

5 A I --

6 Q As you began the evaluation?

7 A I communicated with her early within the evaluation,
8 yes.

9 Q And did she make any requests of you at that point?

10 A It appeared she wanted to have a little bit more
11 control or influence over what testing I would be giving to
12 the defendant.

13 Q And what did you do, if anything, about that?

14 A I told her I was not comfortable with that.

15 Q Why not?

16 A Because I thought it might influence my findings.

17 Q Did you have a concern about not seeing the
18 neuropsychological exam also?

19 A Yes.

20 Q What was your concern?

21 A Not having those results was, in my opinion,
22 withholding information that was pertinent in my evaluation.

23 Q Now, you mentioned earlier, a moment ago, that you
24 conducted some effort testing of the defendant, right?

25 A Yes.

D. BRAUMAN - CROSS/MR. TROWEL

50

1 Q Were there other effort tests that you could have done
2 on the defendant?

3 A Yes.

4 Q Why didn't you do them?

5 A Ms. Dolan -- Ms. Dolan did provide me a list of the
6 tests that were administered by the neuropsychologist, and
7 some of the tests that I would given would have just been
8 administered.

9 Q So you were unable to do the testing that you thought
10 was appropriate because of the prior neuropsychological
11 exam?

12 A Correct.

13 Q But you were not permitted to see that exam?

14 A Correct.

15 Q In your report you wrote, I'm quoting page 11 of what's
16 been admitted as Defense Exhibit 1, that "The defendant was
17 similarly unable to identify the AUSA and --

18 THE COURT: Slow it down please for the reporter.

19 Q "The defendant was similarly unable to identify the
20 AUSA and even misidentified him as a female." Do you recall
21 that writing that in the report?

22 A I did write that. I subsequently came to understand
23 that there was also a female assigned to this case, so that
24 line in that report should be stricken.

25 Q What relevance did your original understanding -- what

D. BRAUMAN - CROSS/MR. TROWEL

51

1 relevance did it have to your conclusion when you thought
2 the defendant was mistaken about the AUSA?

3 A It was just one piece of data; however, overall, I
4 still found that he had a factual understanding of the
5 proceedings.

6 Q When you met with the defendant, did he -- when you
7 discussed with the defendant what he was doing at your
8 facility, did he mention another federal facility by name,
9 do you recall?

10 A He was -- he -- let me start over.

11 He expressed some shock, I would say, in terms of
12 having to come to a detention center. He thought that he
13 was going to be going to FMC Devens.

14 Q And did he mention FMC Devens to you?

15 A Yes.

16 Q Had you mentioned it to him before that?

17 A No.

18 Q So he had learned that, the name of that facility
19 elsewhere?

20 A Yes.

21 Q And retained it until he discussed it with you?

22 A Right.

23 Q In the course of that interview, did he -- did you ask
24 him for contact information for family members?

25 A I did.

D. BRAUMAN - CROSS/MR. TROWEL

52

1 Q Did he provide you with phone numbers, if you recall?

2 A He provided two of the three phone numbers I asked for.

3 Q Did he provide a phone number for one Alex Shapiro?

4 A That sounds familiar, yes.

5 Q Did he provide that phone number to you from memory?

6 A I believe so.

7 Q Did he have anything on him where he could have, you
8 know, stored that phone number?

9 MS. DOLAN: Objection.

10 THE COURT: Sustained as to whether he could have.

11 Q Did he, in fact, have that phone number on his person,
12 do you remember?

13 MS. DOLAN: Objection.

14 THE COURT: If you know.

15 A I don't remember.

16 Q Did he provide you with a phone number for his son?

17 A Yes.

18 Q And do you recall whether he provided that from memory?

19 A I don't remember.

20 Q Again, do you recall him having that on a document with
21 him?

22 A I don't recall.

23 Q And then he provided with you a number that he said was
24 for his wife, but it was, in fact, for his daughter; is that
25 correct?

D. BRAUMAN - CROSS/MR. TROWEL

53

1 A Yes.

2 Q You mentioned on direct that your conclusion was based
3 in large part on your concerns that he had a limited ability
4 to retain information; is that correct?

5 A Yes.

6 Q And that as a result of that, he couldn't make an
7 informed decision about legal issues in this case; is that
8 right?

9 A Right.

10 Q You testified though a few moments ago, I think on
11 direct and on cross, that he was able to recite to you facts
12 of his case. Do you recall testifying that way?

13 A Yes.

14 Q And you also testified that he described his
15 relationship with his lawyer with you; is that right?

16 A Yes.

17 Q And he had -- do you know when the last time that he
18 had met with his lawyer?

19 A I don't know.

20 Q You also testified on direct that you were concerned
21 about whether he could work with his lawyer, right?

22 A Right.

23 Q But you also testified that he said they had a friendly
24 relationship, right?

25 A Yes.

D. BRAUMAN - CROSS/MR. TROWEL

54

1 Q And that he believed she listened to him, right?

2 A Right.

3 Q And that he felt like they were a team; is that right?

4 A Yes.

5 Q Is it fair to say that your primary concern was his
6 ability to retain information?

7 A My primary concern was his ability to collaborate with
8 defense on a strategy, given the difficulty with retaining
9 information.

10 Q In the course of your -- how long is your evaluation
11 that you conducted of the defendant?

12 MS. DOLAN: Objection, already asked and answered.

13 THE COURT: Eight meetings, seven hours, eight
14 hours.

15 MR. TROWEL: Over what period of time, your Honor,
16 that's what I'm asking.

17 THE COURT: You may answer it again.

18 THE WITNESS: It was just short of four weeks.

19 BY MR. TROWEL:

20 Q Now, your ultimate diagnosis, I think you said on
21 direct, was that the defendant had dementia not otherwise
22 specified; is that correct?

23 A Yes.

24 Q In your experience and based on your expert opinion is
25 it possible for someone with that diagnosis to be found

1 competent?

2 A It's possible, yes.

3 Q Did your report recommend that the defendant should be
4 further evaluated to determine if his competency could be
5 restored?

6 A Yes, that's standard language in our reports when
7 someone is opined not competent.

8 Q Based on your examination of the defendant and your
9 expert opinion, would it surprise you to learn that
10 following a subsequent restoration evaluation, his
11 competency was, in fact, restored?

12 A I would not be surprised.

13 Q Why is that?

14 A That's common.

15 Q Can you expand on that? Why, why in your experience?

16 A When an individual goes to a medical center such as
17 Butner, they're there for an extended period of time, they
18 may be able to educate him or provide other neruo behavioral
19 interventions or accomodation strategies for whatever
20 deficits may exist.

21 Q Do they also just see him for a longer period of time?

22 A Yes.

23 Q Do they do additional testing?

24 A Correct.

25 Q Do they have additional opportunities to observe him?

D. BRAUMAN - REDIRECT/MS. DOLAN

56

1 A Yes.

2 Q And are all of those relevant to a subsequent
3 determination?

4 A They are relevant, yes.

5 MR. TROWEL: Okay. Nothing further, your Honor.

6 THE COURT: Your witness.

7 REDIRECT EXAMINATION

8 BY MS. DOLAN:

9 Q Dr. Brauman --

10 MS. DOLAN: I'm going to ask permission to
11 approach the witness with my laptop here, Judge.

12 THE COURT: Maybe Mr. Jackson can help you. You
13 don't have the -- the Elmo doesn't do it?

14 MS. DOLAN: I just want to put something up on the
15 Elmo -- or up on the screens from my laptop directly and I
16 don't see a USB port.

17 THE COURT: All right. Mr. Jackson will do that
18 for you. We don't allow counsel to encroach upon witnesses,
19 it's too frightening.

20 COURTROOM DEPUTY: She doesn't have an updated
21 laptop, Judge.

22 MS. DOLAN: I actually do.

23 THE COURT: I was going to say, you probably have
24 the updated one, I know where the tech fault line lies in
25 this courthouse.

D. BRAUMAN - REDIRECT/MS. DOLAN

57

1 MS. DOLAN: I'm afraid to say.

2 THE COURT: Do you have it in terms of what you
3 want to present to the witness?

4 MS. DOLAN: Yeah, but I've only got it on the
5 laptop. Let me see what I can do from here.

6 THE COURT: Well, why don't you read it to the
7 witness and then ask the witness to respond, just so we'll
8 do it old school, line-by-line.

9 MS. DOLAN: I'll do the best I can.

10 THE COURT: Thank you. Sorry for the horse and
11 buggy.

12 BY MS. DOLAN:

13 Q Now, Dr. Brauman, Mr. Trowel just talked to you about
14 my -- well, that I declined to provide you with the reports
15 that had been generated by the neuropsychologist that the
16 defense had retained?

17 A Correct.

18 Q And he also mentioned a report from defense counsel, I
19 think that's how -- the exact word that he used, as to
20 Mr. Bumagin's -- as to Mr. Bumagin?

21 A I don't recall specifically.

22 Q Well, did I ever give you a report?

23 A No.

24 Q Did I send you an E-mail on -- I sent you an E-mail
25 with a variety of information, correct?

D. BRAUMAN - REDIRECT/MS. DOLAN

58

1 A Yes.

2 Q And that was in -- on or about August 2nd of 2012,
3 correct?

4 A That sounds about right.

5 Q And I listed 18 -- the names of 18 tests that the
6 defense neuropsychologist administered, correct?

7 A Yes.

8 (Document handed to Ms. Dolan.)

9 MS. DOLAN: Oh, good, Mr. Trowel is saving the
10 day.

11 If I could pass what's been pre-marked as
12 3500-DB-11 up to the witness?

13 THE COURT: Yes. Mr. Jackson, would you put that
14 in front of the witness?

15 COURTROOM DEPUTY: Sure, Judge.

16 (Document handed to the witness.)

17 BY MS. DOLAN:

18 Q Now, Mr. Trowel also characterized, if you're not being
19 able to do certain tests that you're being prohibited from
20 doing certain tests.

21 You weren't able to do those tests because they
22 had already been given, correct?

23 A Well, I was concerned about practice effects and repeat
24 administrations.

25 Q And it's fair to say the tests that were given were

1 pretty standard ones, correct?

2 A Yes.

3 Q In fact, they were ones that you, yourself, wanted to
4 give, correct?

5 A Right.

6 Q And with respect to the quote, unquote report that I
7 gave you, there are three sentences concerning information
8 about Mr. Bumagin and his family that I gave you, correct?

9 A Which one are you referring to specifically?

10 Q Paragraphs four and five.

11 A Okay. Yes.

12 Q And drawing your attention to paragraph five, what is
13 it that I told you about Mr. Bumagin's family?

14 A That he experienced situations consistent --

15 THE COURT: Whoa, whoa, whoa, slow it down,
16 cowgirl, nice and slow, okay? Let's go.

17 THE WITNESS: He experienced situations consistent
18 with disorientation or another condition relating to his
19 cognitive process in the period prior to his arrest.

20 Q Did I give you any specific examples of disorientation?

21 A Based on the family's recollection or your own?

22 Q My own.

23 A Yes. You, in our telephone conversation, I believe.

24 Q And what did I tell you?

25 A That he had difficulty recollecting information that

D. BRAUMAN - REDIRECT/MS. DOLAN

60

1 had been previous discussed.

2 Q But going back to the family, did I give you any
3 specific examples of anything that his family had said?

4 A I would have to look in my file.

5 Q Did I give you any specific examples -- did I try to
6 force a diagnosis on you?

7 A Force a diagnosis? No.

8 Q And could you read what I told you about my concerns
9 relating to Mr. Bumagin, the so-called report from defense
10 counsel?

11 THE COURT: Slowly read, please.

12 A Are you referring to number four?

13 Q Yes.

14 A As we discussed on the phone, I'm concerned whether
15 Mr. Bumagin is able to assist in his own defense due to
16 issues relating to his memory. This concern arises from the
17 questions regarding his ability to remember our discussions
18 of his case over the course of time.

19 Q Now, we're done with that.

20 We had a kind of painful discussion about the
21 difference between etiology and physiology. Etiology and
22 physiology. And etiology of a condition is totally
23 different from physiology, is it not?

24 A Yes.

25 Q And could you distinguish the two for us, please?

D. BRAUMAN - REDIRECT/MS. DOLAN

61

1 A Physiology refers to the actual physical process.
2 Etiology refers to the cause of a process or the cause of a
3 diagnosis.

4 Q And then all those questions about doing the
5 hypothetical about doing better on the tests, that was as to
6 the validity indicator profile, was it not?

7 A Right.

8 Q So if Mr. Bumagin had, in fact, done better on those
9 tests, then you wouldn't have scrutinized the findings and
10 conclusions with that heightened degree of scrutiny that you
11 applied, correct?

12 A Correct.

13 Q Now, Mr. Trowel also asked you about Mr. Bumagin's
14 relationship --

15 THE COURT: Please use the microphone.

16 Q -- with me, correct?

17 A Yes.

18 Q Now, Mr. Bumagin did not volunteer -- when you asked
19 those questions, Mr. Bumagin did not volunteer any potential
20 defenses to you, did he?

21 A No.

22 Q For example, he didn't say talk about entrapment, did
23 he?

24 A I don't recall that, no.

25 Q And he didn't discuss any particular defense strategies

D. BRAUMAN - REDIRECT/MS. DOLAN

62

1 or legal approaches to his case, correct?

2 A Not that I recall.

3 Q Okay. And finally, Mr. Trowel asked you about
4 Mr. Bumagin's rational understanding of the proceedings
5 against him, correct?

6 A Yes.

7 Q And his rational understanding of his specific case,
8 correct?

9 A Yes.

10 Q And finally, his reliability as a historian, including
11 his memory of telephone numbers, correct?

12 A Correct.

13 Q Can you explain how dementia operates on a human being
14 and what it does?

15 A There are various types of dementia. For instance, in
16 one case, someone may have very good recollection of more
17 remote information or background data, and might be able to
18 recall phone numbers and details of their history, but they
19 may be more impaired for learning new information as is the
20 case here.

21 Q Is there a general course of decline for short-term
22 memory in dementia patients?

23 A Each type of dementia has its own specific course, but
24 generally speaking, there wouldn't be an improvement.

25 Q Would you, in dementia patients, differentiate between

D. BRAUMAN - REDIRECT/MS. DOLAN

63

1 long-term memory and short-term memory?

2 A Yes.

3 Q And is that distinction important in making --

4 A Yes.

5 Q And why is it important?

6 A Short-term memory may have more to do with daily
7 functioning over time on their ability to learn new
8 information, retain it and incorporate it. Versus long-term
9 memory, the usefulness of his childhood data during a court
10 case, for instance, is not quite as relevant as information
11 pertaining to the more recent timeframe.

12 Q And is there a -- generally speaking, I understand
13 there are exceptions, but generally speaking, do dementia
14 patients lose their short-term memory first or their
15 long-term memory?

16 A Generally, it is a short term functioning issue first.

17 Q So even if a dementia patient is presenting short-term
18 memory problems, they may still be able to recollect
19 long-term memory with ease, correct?

20 A Yes.

21 MS. DOLAN: I actually thought it was Winston
22 Churchill, not WC Fields, but other than that, I don't have
23 anything further.

24 THE COURT: My guess is they stole from each
25 other, but either way.

D. BRAUMAN - RECROSS/MR. TROWEL

64

1 Your witness.

2 MR. TROWEL: I have a very brief recross, your
3 Honor.

4 THE COURT: Yes, absolutely.

5 RECROSS-EXAMINATION

6 BY MR. TROWEL:

7 Q Dr. Brauman, Ms. Dolan referred to an E-mail she sent
8 to you that listed a number of tests that a previous
9 neuropsychologist had done on the defendant; is that right?

10 A Yes.

11 Q And she sent you the names of the tests, correct?

12 A Yes.

13 Q Did she send you the results of the tests?

14 A No.

15 Q So did you know how the defendant had done on those
16 tests?

17 A I did not.

18 Q Did the fact that he had already been -- did the fact
19 that those tests had already been administered to him limit,
20 in your professional judgment, your ability to --

21 MS. DOLAN: Objection.

22 THE COURT: Let my him finish the question and
23 then you can object.

24 Q Did the fact that the defendant had already been
25 administered those tests, limit you, in your professional

D. BRAUMAN - RECROSS/MR. TROWEL

65

1 opinion, from administering them again?

2 MS. DOLAN: Your Honor, I believe these specific
3 questions were posed on cross.

4 THE COURT: They were not, but I'll allow it.
5 There is no jury here. Why don't you answer the question.

6 THE WITNESS: I was limited, yes.

7 Q Would have you done them if you could have?

8 A Not all of them, but some of them, yes.

9 Q And would they have been relevant to your
10 determination?

11 A Yes.

12 Q Now, you --

13 THE COURT: Let me just be clear: You could have
14 given the test, you elected not to because of what you
15 described as the practice effect; is that correct?

16 You were not precluded from giving those tests,
17 you elected in your professional judgment, with which I'm
18 not quarreling, not to give them?

19 THE WITNESS: Correct.

20 THE COURT: So you could have given them?

21 THE WITNESS: I elected not to give them.

22 THE COURT: Because of the practice effect.

23 THE WITNESS: Right, and the concern of the
24 reliability.

25 THE COURT: And it would have challenged the

D. BRAUMAN - RECROSS/MR. TROWEL

66

1 reliability, it would have undermined the reliability in
2 your view, but there was nothing that precluded you from
3 giving the test; is that correct?

4 THE WITNESS: Correct.

5 THE COURT: And could you have waited a particular
6 period of time to try to mitigate the practice effect, or is
7 that a genie out of the bottle, you can't get it back in; if
8 you've taken the LSATS once, it doesn't matter how long you
9 wait before you take them again.

10 THE WITNESS: Each test is different, but
11 generally speaking, my evaluation was only a 30-day period,
12 so the effects would have not been mitigated enough by the
13 end of that period to give these tests.

14 THE COURT: If you had a longer period of time,
15 and again, I'm asking low-rank questions being a low-rank
16 sort of Judge, but if you had a longer period of time, would
17 you have given those tests and mitigated the -- or
18 ameliorated the practice effect in your professional
19 judgment?

20 THE WITNESS: I believe some of them could have
21 been given, if they were a longer period, yes.

22 THE COURT: Go ahead.

23 MR. TROWEL: Thank you, your Honor.

24 BY MR. TROWEL:

25 Q You have testified obviously about the report and your

D. BRAUMAN - RECROSS/MR. TROWEL

67

1 opinion on the defendant's competency as of the date of your
2 report, correct?

3 A Yes.

4 Q Do you have an opinion about the defendant's competency
5 as you sit here today?

6 A No.

7 Q Why is that?

8 A I have not seen him in almost two years.

9 Q And you also discussed with Ms. Dolan short-term memory
10 issues just a moment ago, right?

11 A Yes.

12 Q Did you, in your personal interactions with the
13 defendant, see that he had -- he was having short-term
14 memory difficulties?

15 A He had difficulty retaining my direction to him not to
16 inquire of me personal questions. And also, his ability or
17 seeming inability to navigate the facility and finding his
18 own housing unit and his cell were concerns for me in terms
19 of his memory, yes.

20 Q You mentioned in your report that he had minor
21 difficulty in navigating the facility; is that right?

22 A Yes.

23 Q Had he just been transferred there from another
24 facility?

25 A He had.

1 Q Did --

2 MR. TROWEL: Nothing further, your Honor. Thank
3 you.

4 THE COURT: Your witness.

5 MS. DOLAN: I'm done.

6 Oh, I have I new witness. I'm done. Thank you.
7 (Witness leaves the witness stand.)

8 MS. DOLAN: The defense calls Dr. Jill Grant.

9 THE COURT: Thank you, ma'am.

10

11 **JILL GRANT**, called by the Defense, having been first duly
12 sworn, was examined and testified as follows:

13 THE COURT: Please sit down, Doctor. And I'm
14 going to ask you to speak clearly and distinctly into the
15 microphone as I ask people to channel their inner Lord Vader
16 and not their inner Diane Keaton; keep your voice up and
17 please state and spell your name, and then counsel will have
18 some questions.

19 THE WITNESS: Okay. My name is Dr. Jill R. Grant.
20 That's J-I-L-L, Middle initial "R", G-R-A-N-T.

21 THE COURT: Thank you, Doctor. You may proceed,
22 counsel.

23 DIRECT EXAMINATION

24 BY MS. DOLAN:

25 Q Good afternoon, Dr. Grant.

J. GRANT - DIRECT/MS. DOLAN

69

1 A Good afternoon.

2 Q Have you and I ever spoken before?

3 A We have.

4 Q And how many times have we spoken?

5 A I can't recall. We have exchanged E-mails and spoke on
6 the phone at least once, maybe more than that.

7 Q Was that the time that Mr. Bumagin was also on the
8 telephone?

9 A Yes. One of those times he was, and it may be the only
10 time we've spoken on the phone.

11 Q We'll get back to that in a minute.

12 And you and I have corresponded back and forth via
13 E-mail, correct?

14 A Yes.

15 Q And did I make a variety of requests to you for
16 procedures and protocol of the BOP in terms of questioning
17 defendants undergoing competency evaluations about the
18 underlying defense conduct?

19 A Yes, you did.

20 Q And did you ultimately provide any such documentation?

21 A Yes. I exchanged a few E-mails with you regarding my
22 understanding of what you wanted. And then I consulted with
23 our legal counsel and my supervisor, and I believe -- I
24 don't know if I sent them directly or our legal counsel sent
25 you federal guidelines, and then I responded to your request

J. GRANT - DIRECT/MS. DOLAN

70

1 as best as I could as my understanding of my role.

2 Q And after the guidelines were provided, I indicated
3 that they did not touch upon the subject matter that I
4 inquired about and I inquired further, correct?

5 A Yes. I believe I directed you to our legal team.

6 Q Okay. And other than that, have you and I communicated
7 any further?

8 A Not to my recollection.

9 Q Have you communicated with the government about this
10 case?

11 A Yes.

12 Q Approximately how many times?

13 A I don't recall. I don't recall.

14 Q More than two?

15 A Yes.

16 Q More than ten?

17 A No.

18 Q And what was the substance of those discussions?

19 A I was contacted about the potential competency hearing.

20 So over a period of several months I've been
21 contacted periodically about scheduling a hearing, and then
22 that was changed over time.

23 Q And did the government discuss your report with you at
24 all?

25 A They did, recently.

J. GRANT - DIRECT/MS. DOLAN

71

1 Q And how many times did that happen?

2 A I believe we talked on the phone twice.

3 Q And have I contacted you about your report?

4 A You have not.

5 Q Could you briefly tell us where you work and how long
6 you've been there and what you do.

7 MS. DOLAN: And if I can ask for a stapler?

8 A Sure. I currently work at the federal medical prison
9 in Butner, North Carolina. I'm employed as a forensic
10 psychologist. I've been employed at that facility since
11 November of 2000.

12 Prior to that, I've worked in other bureau of
13 prisons facilities, and within the department of corrections
14 with a Master's level degree at that point.

15 Q And what exactly is your role and what does it entail
16 generally at FMC Butner?

17 A My role is to conduct evaluations, court-ordered
18 evaluations; pretrial primarily, but not exclusively for
19 competency to stand trial, competency restoration, insanity
20 at the time of the offense, and dangerousness.

21 I also supervise predoctoral interns in conducting
22 those evaluations, and I testify as needed.

23 Q For the government or for the defense?

24 A Both.

25 Q Now, in connection with this case you -- well, how many

J. GRANT - DIRECT/MS. DOLAN

72

1 times have you testified on behalf of the defense?

2 A I don't know, exactly. I've testified in total over
3 100 times. I would say that most of those I'm called either
4 by the prosecution or just called to testify in general; and
5 a handful of times by the defense specifically.

6 Q For example, like I called you, in a case like this?

7 A Yes. I was called in general for this hearing and
8 didn't know who was actually calling me as a witness.

9 Q Now, you administered a sort of competency to stand
10 trial questionnaire with 25 specific questions on it,
11 correct, to Mr. Bumagin?

12 A Correct.

13 Q And that was a -- was this an open-ended for
14 forced-choice?

15 A This was a forced-choice questionnaire.

16 Q I'm putting on the screen what's been pre-marked for
17 identification as DX-2.

18 Do you recognize this?

19 A Yes.

20 Q And what is it?

21 A It is a questionnaire that we derived in-house to help
22 us come to some conclusions about a defendant's factual
23 understanding of the legal system.

24 It can be used for educational purposes to help
25 educate if an individual does not understand that system or,

J. GRANT - DIRECT/MS. DOLAN

73

1 you know, the roles of the courtroom personnel and such.

2 It can also be used as a symptom validity test to
3 see if a person is exerting effort and answering questions
4 to the best of their ability.

5 And it can also be used just to gain factual
6 information to see if they know the factual information
7 related to the legal system.

8 Q And is this a copy of the test that you administered to
9 Mr. Bumagin?

10 A Yes. It's actually a questionnaire, it's not a test,
11 it's not been --

12 Q Dr. Grant, it's a yes or no question.

13 A I administer a questionnaire, not a test.

14 Q Is this the questionnaire that you administered?

15 A Yes, it is.

16 MS. DOLAN: Okay. I move this into evidence.

17 MR. TROWEL: No objection, your Honor.

18 THE COURT: Admitted.

19 (Defense Exhibit DX-2 was admitted into evidence.)

20 Q Now, this is a true/false questionnaire, right?

21 A No, it's not.

22 Q It's got two choices for each question, correct?

23 A Correct.

24 Q Now, in terms of gradations of a forced-choice
25 questionnaire, this is about as basic as it gets, is it not?

J. GRANT - DIRECT/MS. DOLAN

74

1 A It's very basic, yes.

2 Q So this doesn't even have multiple possible answers,
3 just two?

4 A Correct.

5 Q And how many questions deal specifically with the
6 person's relationship with the lawyer?

7 A I believe there is one question relating to that.

8 Q And that question is, what does your lawyer do?
9 Choice A, solves the crime or choice B, takes your side?

10 A Yes.

11 Q Those are the only options?

12 A Yes.

13 Q Now, is there a reason that you didn't administer an
14 open-ended questionnaire?

15 A Yes. I asked open-ended questions in addition to this.
16 I did not base my decision on this questionnaire alone.

17 Q Okay. Where are those questions?

18 A They were in -- conducted in the course of the clinical
19 interview. And I believe I took some notes on the back of
20 this questionnaire that reflect his answers to some of my
21 questions.

22 Q Did you write down the questions?

23 A I did not.

24 Q Why not?

25 A I just did not. I didn't feel it was necessary. I was

J. GRANT - DIRECT/MS. DOLAN

75

1 able to -- I typed them into my report from memory the same
2 day, so I didn't feel it was necessary.

3 Q Now, does this questionnaire test current executive
4 function or long-term memory of the criminal justice system?

5 A Could you repeat that question, please?

6 THE COURT: Read it back, please.

7 (The last question was read back.)

8 THE WITNESS: Neither.

9 Q What does it test?

10 A It doesn't test anything, but it gives me information
11 about an individual's factual understanding of the court
12 system.

13 Q Can you tell us what this factual understanding is?

14 A Well, the first question asks him about a witness and
15 if he has a good understanding of that. What happens when
16 you go to court, the role of the Judge and the jury, et
17 cetera.

18 Q So this questionnaire does not inquire into dynamic
19 roles just static roles, correct?

20 A I'm not sure I understand your question.

21 Q Well, this questionnaire doesn't inquire into
22 processing information as it's unfolding, does it?

23 A It does ask about his understanding about the
24 difference between being found guilty and just being
25 arrested.

J. GRANT - DIRECT/MS. DOLAN

76

1 So I didn't ask him about specific case events. I
2 did not ask him about specific things unfolding in a
3 situation, but I believe that some of these questions do get
4 his understanding of that general process.

5 Q Can you give us an example?

6 A Yes. We just see right here -- yeah.

7 Q I can change the page.

8 A Yes. For example, what is a crime? He understood the
9 difference of when you go to jail and when you break the
10 law, and that kind of represents the unfolding of a process.

11 On the next page --

12 Q Well, when you say "kind of represents the unfolding of
13 a process" what do you mean by that sentence?

14 A What I mean is that an individual's arrested --
15 typically when an individual is arrested, the next page will
16 reflect this better, but when an individual is arrested, it
17 doesn't mean they're necessarily convicted of a crime, it
18 doesn't mean that they're necessarily guilty of a crime.

19 So the next step that starts the thinking process
20 on that number nine question, but if you flip the
21 questionnaire to the next page --

22 Q On a scale of one to ten, how bad would a person's
23 cognitive ability have to be before they got this question
24 wrong?

25 MR. TROWEL: Objection.

J. GRANT - DIRECT/MS. DOLAN

77

1 THE COURT: Overruled. She can answer.

2 THE WITNESS: A lot of people whom I ask get it
3 wrong?

4 THE COURT: Can you answer the question in the
5 terms it was asked, on a scale of one to ten.

6 THE WITNESS: On a scale of one to ten, I could
7 give an percentage perhaps.

8 THE COURT: Why don't you do it that way, if you
9 can't do it on the scale of one to ten, how about a
10 percentage?

11 THE WITNESS: I would say approximately -- I don't
12 use this questionnaire with everyone, but I would say with
13 the folks that I do administer it to, 30 to 40 percent.

14 MS. DOLAN: No, we're asking about --

15 THE COURT: No. No. Let her finish the answer.
16 Go ahead.

17 THE WITNESS: I answered it incorrectly.

18 THE COURT: Answer the question, please. Read the
19 question back -- or if you want, read my questions back and
20 answer my question and then you can go on to another
21 question.

22 (The last question was read back.)

23 THE COURT: What percentage?

24 THE WITNESS: Approximately 30 percent.

25 THE COURT: Next question, counsel.

J. GRANT - DIRECT/MS. DOLAN

78

1 MS. DOLAN: Well, that's not the question.

2 BY MS. DOLAN:

3 Q The question is: How far gone would somebody have to
4 be before they start getting that question wrong?

5 A I don't know.

6 Q Now, how many questions on this questionnaire did
7 Mr. Bumagin answer correctly?

8 A He answered them all correctly.

9 Q And is that consistent with somebody who has a rational
10 understanding of the criminal justice system in the United
11 States?

12 A It could be, but not necessarily.

13 Q And does that involve a determination of that
14 individual's ability to function effectively with defense
15 counsel in that environment?

16 A No, I don't believe that that -- that this
17 questionnaire hits on that issue at all.

18 Q Handing up to the witness what's been marked as Defense
19 Exhibit A through I.

20 THE COURT: Mr. Jackson?

21 MS. DOLAN: I'm making a pit stop at the
22 government's table. Can you have a look at those, please?

23 MR. TROWEL: Your Honor, just so the record is
24 clear, could defense counsel repeat the numbers, the
25 exhibits numbers?

J. GRANT - DIRECT/MS. DOLAN

79

1 MS. DOLAN: Letter A through letter I, as in
2 "imagine."

3 Q Do you recognize those?

4 A I do.

5 Q And what are those?

6 A These are medical records from his stay at Butner.

7 MS. DOLAN: I move those into evidence.

8 THE COURT: Any objection?

9 MR. TROWEL: No objection, your Honor.

10 Does defense counsel have a copy so that we know
11 what documents we've been talking about.

12 MS. DOLAN: I can put them on the Elmo.

13 THE COURT: Why don't you do that.

14 MS. DOLAN: Thank you.

15 COURTROOM DEPUTY: Do you need them back?

16 MS. DOLAN: Yes, please. Just for clarity, these
17 are in evidence now, correct?

18 THE COURT: Yes, if you have them properly
19 identified. There is no objection, right?

20 MR. TROWEL: No objection.

21 THE COURT: All right. They're admitted. Would
22 you identify them for the record, please?

23 (Defense Exhibits A to I were admitted into
24 evidence.)

25 BY MS. DOLAN: